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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE

CISCO SYSTEMS, INC., Plaintiff, vs. TELECONFERENCE SYSTEMS, LLC, *ET AL.*, Defendants.	)	NO. C 09-1550 JSW
	)	San Francisco, California
	)	Friday
	)	August 6, 2010
	)	1:31 p.m.
TELECONFERENCE SYSTEMS LLC, Plaintiff, vs. TANDBERG, INC., *ET AL.*, Defendants.	)	NO. C 10-01325 JSW

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Teleconference Systems, LLC; Margella Communications, Inc.:

The Simon Law Firm
701 Market Street, Suite 1450
St. Louis, MO 63101
(314) 241-2929
(314) 241-2029

BY: ANTHONY GERARD SIMON
TIMOTHY EDWARD GROCHOCINSKI

Reported By: Lydia Zinn, CSR #9223, RPR
Official Reporter - U.S. District Court

APPEARANCES (CONT'D)

For Teleconference Systems, LLC:
Robert W. Hicks & Associates
14510 Big Basin Way, Suite 151
Saratoga, CA 95070
(619) 846-4333
(619) 236-3413 (fax)
BY: KENNETH ROBERT WRIGHT

For Tandberg, Inc.; Bayer Corporation; Avago Technologies U.S., Inc.; One Communications Corporation:
Weil, Gotshal & Manges LLP
201 Redwood Shores Parkway
Redwood Shores, California 94065
(650) 802-3993
(650) 802-3100 (fax)
BY: EDWARD ROBERT REINES
ANDREW LOUIS PERITO
SONAL N. MEHTA
MATTHEW DOUGLAS POWERS

For SAP America:
Duane Morris LLP
One Market Street
Spear Tower, Suite 2000
San Francisco, CA 94105-1104
(415) 371-2200
BY: STEPHEN HOLBROOK SUTRO

THE CLERK: Calling Case C. 10-1325, *Teleconference Systems versus Tandberg*; and Case C. 09-1550, *Cisco Systems, Inc., versus Teleconference Systems, et al.*

THE COURT: All right. Please, everybody, would you state your appearances, please?

MR. SIMON: Yes, your Honor. Anthony Simon, on behalf of Teleconference in both cases.

MR. GROCHOCINSKI: Tim Grochocinski, on behalf of Teleconference in both cases, your Honor.

MR. WRIGHT: Good afternoon, your Honor. Kenneth Wright, for the Teleconference Systems in both cases.

MR. REINES: Good afternoon, your Honor. Edward Reines, Sonal Mehta, Andrew Perito, from Weil Gotshal, on behalf of Cisco, and all of the customer defendants, and Tandberg as well. I can enumerate the customer defendants, if you think it's necessary, except for one.

THE COURT: I don't think it's necessary.

MR. SUTRO: Steve Sutro, for customer defendant SAP America, in just the Cisco matter; the case -1550.

THE COURT: All right. Very well. Welcome to all counsel.

I called both cases together because, obviously, there are similarities; a lot of overlaps. And the cases are -- they're officially related, correct, Mr. Reines?

MR. REINES: Actually, your Honor, they were deemed

not related, but through a fluke of the wheel of judges, you received both. So --

THE COURT: If one were a conspiracy theorist -- I might have some thoughts about that.

MR. REINES: I think you're right, but basically the parties have agreed that coördination made sense. And we can deal with that however the Court --

THE COURT: Yes. All right. Well, I think that's a good idea. And so the best way to do this, I think, is -- the parties put together a very good plan in their respective joint case-management conference statements. So I thought what I would do is -- and I know, obviously, many of the dates coördinate with each other. So I'll start with Case Number 09-1550, *Cisco versus Teleconference, et al*, and set the dates in that case; and then do likewise in the other case.

And then, to the extent that anybody else -- anybody has any issues, I'll start with the first case, and then move right along.

So, if you will, turn to the schedule that you have in that case. Starting on page 11, the Court has noted the dates there. And, with a couple of minor exceptions to accommodate the Court's schedule, I'm going to adopt the schedule that you've proposed.

So all of the dates, starting with the first one, the disclosure of asserted claims, et cetera, on September 3rd, and

proceeding through the -- on the next page, the filing of reply patent claim-construction brief will be the order of the Court and adopted by the Court, March 4th, 2011; but with respect to the claim-construction hearing, I'm going to change the dates slightly.

There is one question I have that -- I just noticed this. Is there a tutorial built in into this schedule, or am I missing something here?

MR. REINES: Your Honor, we didn't include that. We assumed we could talk about that today.

THE COURT: All right. Well, let me set the dates, then. So for the claim-construction hearing, it's going to be on March the 22nd at 1:30. And that's 2011, obviously.

And the further case-management conference will be at March 29th, 2011, at 1:00 p.m. That's subject to change, depending upon when the Court gets around to doing the claim-construction order.

I generally like to have a tutorial roughly two weeks before the claim construction; so sometime at the end of February, and preferably on a Wednesday afternoon. So, Madam Clerk, if we can pick a date late February of 2011 for a tutorial.

THE CLERK: Wednesday, February 23rd.

THE COURT: All right. And -- and we'll make that at, let's say, 1:00 o'clock. And that will give us plenty of

time.

And the question I have is, just to segue for a moment to case 10-01325, would it be appropriate to have a tutorial -- see, an interesting -- in that case, I'm looking at my notes for that case. And actually, I had set a tutorial; but is there any benefit to having one tutorial for both cases, or is the technology the same?

MR. REINES: The technology's the same, for all practical purposes. I think it would be unnecessary for the Court to spend its time on two hearings.

THE COURT: All right. Well --

MR. SIMON: We agree one tutorial is fine. There might be some differences in the accused products, but as far as the technology of the patent for purposes of claim construction, it's the same.

THE COURT: All right. Yeah. It's -- I think I was a little off on my game here when I did this, because I'm now comparing the schedules. Although I tried to coördinate the two of them, I didn't do a perfect job on that, because I have noted that I set the -- in my notes, when I had my calendar in front of me, in the *Teleconference versus Tandberg* case, I had set the tutorial for March the 22nd, and the claim construction for March the 29th.

All right. Here's what I'm going to do. I think the way to do this is to have both cases go the same way. So

disregard the further-case-management-conference date that I set in the first case, in the *Cisco* case, as I will set that in my claim-construction order. And I'm going to set -- so I'm going to set the tutorial in the *Cisco* case March 22nd, 2011, at 1:30; and the claim construction on March 29th, 2011, at 1:00 p.m. And that gets -- that will give everything put everything into a parallel mode for the two cases.

So I'm also going to -- although I have frequently -- most of the time I handle my own discovery dispute resolution. I have found, reluctantly, that in patent cases, that's absolutely impossible, not because people are more contentious, although they are; it's just that there are -- many more discovery disputes seem to arise.

So I'm going to send both cases out to a randomly selected magistrate judge for discovery dispute resolution -- both cases to the same magistrate judge, which I think makes sense, in light of the overlap of the patents involved.

MR. REINES: Your Honor, on that issue, I don't know if your practice is. If the parties had a suggestion of a particular magistrate judge, is that the kind of thing that you're open to, or do you prefer to do it randomly?

THE COURT: You know, I rarely get agreement, but if there's an agreement, I think that any magistrate -- most of the magistrate judges enjoy doing this work in the patent area. So if you all can agree, I would be willing to sign an order,

subject to the approval of the designee, of course.

MR. REINES: Of course. Thank you.

THE COURT: I have to face my colleagues occasionally, so I want to make sure it's okay with them. Usually they're pretty okay with it. So if you can, do that.

I will give you -- how about two weeks from today? So I'll stay referring the discovery to a magistrate judge until two weeks from today, which would be August the 20th.

And parties should notify me either way by the close of business that day; whether they've agreed or not. If you haven't agreed, then it will be self-executing, and the minutes will reflect that the Court will refer the matter out to a randomly selected magistrate judge.

The other thing you could do is you could -- I give parties this option when there's general consent, which I'm not necessarily suggesting in these cases. You can agree to a small group of magistrate judges that you all can agree on. Maybe you don't agree on *X*, but you can agree on *X*, *Y*, and *Z*, but not the rest of the alphabet. And we'll randomly assign it to one of those three folks that you have so designated.

So I don't know, in the *Cisco versus Teleconference*, if there are any other issues to be discussed at this time.

I assume that the parties have discussed ADR in that case. What's the status of any ADR movement?

MR. REINES: We're in front of Judge Spero, who's

obviously very good at these things. And we've had preliminary discussions. We have a call with him August 11th to set up the next discussions we're going to have. It's moving apace, and the parties are working very coöperatively.

THE COURT: On both cases?

MR. REINES: On both cases.

THE COURT: Is there anything else in the *Cisco* case?

MR. REINES: Yes, your Honor. I think there's -- I think there's at least two issues that we would like to discuss. One is a little bit of a chunky procedural issue, which is bifurcation of damages -- liability and damages. It's commonly done. It's certainly not always done. It's case specific. We think this is a poster child for bifurcation. And let me explain why; what's unique about this that makes that fit so nicely.

In this case, as you could tell, there's a lot of customers, which is not typical.

THE COURT: Right.

MR. REINES: And our concern is that the theory of damages recovery that's been articulated at this point -- it's been a big focus in settlement in our discussions -- is recovery for cost savings due to having a high-end video-conferencing system. And the theory is that it's -- that the royalty wouldn't be on the cost that Cisco charges its customers to buy its video-conferencing system, but that the --

that Teleconference Systems would share in the savings.

So, for example, if you have a teleconference between New York and San Francisco, the cost savings is: Two people don't have to fly from San Francisco to New York, and stay in hotel, and stay in an airplane, and the cost of time lost to travel.

Obviously, if you're going -- every video-conference system at major companies, such as Procter & Gamble, and banks, and Wells Fargo, and whatever it is -- that kind of calculation is a nightmare. I mean, just every time a video-conference system is used, determining savings. And even trying to do it at a generalized level of: What are your general travel budgets for all of your different personnel, and how have those been reduced? Or however you try to do it, it's extremely complicated. This isn't your garden-variety, 5-percent-of-revenue case.

And so, instead of having 11 different parties or 12 parties or 13 different parties exposing themselves and their management to that kind of invasive discovery, we propose in this case that what makes sense is to have a liability phase, and determine whether or not there is actual liability.

And then, if there is liability, if they want to attempt to count up frequent-flier miles in their value and everything else, at that point in time, we could take that major undertaking.

Of course, we have arguments that that's not an appropriate way to do the calculation anyway; but they're going to seek discovery on it.

So you have 12 different parties that would be exposed to such discovery, when normally the manufacturer -- if it was just us and them, to be honest with you, I would -- if it was a typical case, Teleconference Systems against Cisco, and they just want 2 percent per system, I wouldn't be here proposing a bifurcation of liability damages; but it's these sort of innocent third parties who just bought a video-conference system, and the invasiveness and burden on them, that raises this.

THE COURT: How would bifurcation, before I hear from defendants, impact settlement discussions? Because, to the extent that the plaintiffs don't have an opportunity to discovery on damages, you can discuss liability only so long in settlement discussions; but what would be the basis for there being bargaining or negotiation with respect to damages?

MR. REINES: I anticipated you'd ask that good question. And the answer to that is that we've been in discussions in front of Judge Spero.

And the primary interaction -- I don't want to get into the specifics, and I'm sure this doesn't -- is that Teleconference Systems has sought this precise information, because they really want to get the cost savings as their

royalty base.

We've agreed, for purposes of the settlement discussions, to provide the high-level numbers. So, in other words, if there was a marketing presentation that Cisco is selling its teleconferencing system that says, "If you buy our teleconferencing system for" -- I don't know. 50,000, or $100,000, or whatever it is -- "you will save a million dollars." We're agreeing to give them those -- like, that marketing-style information, because that -- because then we think we can get a settlement discussion going.

Those numbers are not -- are going to be pie in the sky, as far as we're concerned, from a settlement perspective; but that's neither here nor there, for present purposes. So we're not refusing outright to give them information at the high level; the marketing deal/transaction/purchase information that you might have.

What we are objecting to and wouldn't do in a settlement context, and probably wouldn't do voluntarily, even in the court -- in the court context, without a fight, to be honest, is the counting of the beans; is the counting of: What was the real savings that was accomplished? Because it's just a -- it's just a nightmare, from a discovery perspective.

THE COURT: So under your proposal, then, other than with respect to settlement discussions, damages would be placed on hold for purposes of, for the moment, discovery.

We go through and construe the appropriate terms. Summary judgment would ensue. And then, if the case still survived, then we would open up discovery with respect to damages?

MR. REINES: We're pragmatic. So if at any point in time it became obvious that, for some reason, damages needed to open up -- as you say, summary judgment -- we'd be open to that.

I don't think it should be something chiseled in stone; but at this stage in the case, it just seems that what we're going to get is a wave of invasive discovery on all these different parties that's extremely expensive, and might be a basis for settlement, itself, on the burden side.

And so -- but you describe, I think, properly, how we're looking at how this should be handled.

In the settlement process we've been -- the Judge has ordered us -- Spero -- to provide materials necessary for settlement. So he's going to be administering what we need to give them that he thinks is necessary, from a settlement perspective. So he retains that power to do that.

THE COURT: All right. Let me hear from the defendants.

MR. SIMON: Your Honor, Tony Simon, on behalf of the defendants.

I think the biggest consideration we have is exactly

the one your Honor pointed out. And that's one of the disputes we have that we're going to discuss with Judge Spero next week. The problem is the marketing information that they want to give us. They can agree it's pie in the sky, and not relevant to settlement.

Contrary to the representations made about this theory, you know, the Section 284 of the patent statute says we're entitled to a reasonable royalty based on the defendants' use of the system.

We didn't sue Cisco initially. We didn't sue their customers. Cisco doesn't sell the whole system.

We sued defendants who had our system -- our client -- you know, covered by our client's patent -- for using the system. And their use generates cost savings.

It's a matter of: What was your budget for travel expenses -- the actual expenses before you had the system for three years? And what were your travel expenses after you acquired the system? That's what the discovery consists of. It's not burdensome. It's not novel.

THE COURT: Why does it have to happen now? If I were -- for example, if I were to go even slightly further -- maybe it's not even further than what Mr. Reines just proposed -- and delegated to the magistrate judge doing the settlement the authority -- we're appropriating a native settlement to order appropriate discovery -- how are you

harmed, at this point?

MR. SIMON: Well, there are actually three other reasons. The most important one was settlement. Obviously, that would be taken care of there; but the second reason, Judge, is --

THE COURT: Please don't call me "Judge." I don't like it.

MR. SIMON: I'm sorry, your Honor.

THE COURT: Thank you.

MR. SIMON: Your Honor, the second reason would be with respect to duplication of travel. We are going to each defendant and take a deposition for liability purposes. We think it's most efficient, since these defendants are spread across the country, to take the second day and get the information with respect to the damages.

The other reason is it's an overlapping relevance. And I fear that it's going to spur additional discovery disputes. The commercial success is relevant to the invalidity issue, so it goes to the liability stage.

They're going to argue that the patented invention is obviousness. Some of our rebuttal for that liability issue goes to the commercial success. And the commercial success goes directly to the use made by the defendants of the invention; the acceptance in the industry; those kinds of things.

And then the last one, your Honor, is with respect to -- with respect to the settlement issue. And this is a little bit tricky, because we have not been able to determine this, but it's one of the reasons it's not a typical customer suit, is that we are trying to negotiate settlements with each defendant. We -- it's not clear to us whether or not Cisco is stepping in and agreeing to indemnify fully the amount of any judgment. So a particular defendant, unless we get that particularized discovery, won't even know the extent of our liability to consider settlement if we're not able to get that information.

THE COURT: All right. Mr. Reines, how do you respond to each of those points?

MR. REINES: Thank you, your Honor.

On the first issue, which is the second day of deposition, common sense tells us the party -- the person that's going to know about the specifics of the technology, of how it's configured in terms of the boxes they have for video teleconferences, is a different person than the person that's maintaining the travel budget or the person that's booking meetings or whatever else.

THE COURT: But what if it wasn't? You say that, but let's say they depose -- they notice the deposition of -- let's just pick a 30(b)(6) deposition on person most knowledgeable on *XYZ*. And that happens to include -- and this is also a

marketing person. So it -- I mean, you say that, but if you can't -- you know, they have a right to do anything appropriate discovery, unless I order bifurcation.

MR. REINES: Yeah. I think that argument would apply every time that, you know, there's bifurcation. Obviously, a lot of courts use that tool. And it's recommend in all of the classic management guides.

I think the extent of overlap is very small, for the reasons I just described. If there was some unique situation, we've worked very coöperatively throughout the last year and a half in this case, and I think we could do that. We're not going to be headstrong about that issue, but I just don't think the extent of that is substantial.

And to the extent it's a second day for every witness, yes, we're saying a second day for every one of the customers' witnesses should happen until liability is established, because of the unusual extent of the burden here of the damages discovery. And -- and Teleconference Systems doesn't deny what kind of discovery they're going to be seeking on the travel budgets and everything else.

The second argument that was made is commercial success. And again, if the presence of commercial success in the patent case was a poison pill for bifurcation, then there would never be bifurcation.

Here, it is -- again, we're willing to give some

generalized information in the marketing-level information, but the idea that they're going to prove that their patent's valid because, many years after it issued, some people saved more or less money on first-class or business-class tickets is so indirect, I'm sure that we'll be able to satisfy their desire for information regarding commercial success that's sufficient, that doesn't require plunging into each of 12 or 13 companies and their entire travel guidance surrounding their teleconference systems.

The third issue I didn't really get. Cisco is obviously stepping to the plate in this case. As -- by the fact that we're the attorneys here for these defendants.

I don't know what they need. We're the one going to the settlement conference. I don't know what information they need that -- I don't know how discovery that's invasive of them would inform them as to what -- how the case is to be resolved. And I'm concerned that a lot of invasive discovery of them would create a lot of problems in a customer base that would create the wrong kind of settlement dynamic.

THE COURT: All right. I'll give you the last word, if you wish, but not to repeat any of the arguments.

MR. SIMON: Your Honor, I really don't have anything to add.

THE COURT: All right. What I'm going do at this point is the following. And I think it takes into account the

arguments on both sides, but also achieves judicial economy.

I'm going to order bifurcation of liability and damages. And I'm going to call it "presumptive bifurcation." And what I mean by that is what has already been articulated by both sides. In the settlement context, Magistrate Judge Spero already has exerted his appropriate authority in aid of settlement to order production of relevant documents. And the parties seem to have been coöperative.

If there is a -- if there's resistance to that, at that point, then we go to the second piece of this, which is -- I think it would be a bit awkward to have Judge Spero be the settlement judge and also to litigate discovery disputes, because he might have to get his hands into, you know, the substance of the controversy; but to extent that there is resistance to any order or, if you will, exhortation by Judge Spero to produce damage-related documents for the purpose of settlement, then that could be litigated before the discovery magistrate judge.

And the second reason I'm calling this "presumptive," or, putting it a different way, the exception to the bifurcation, would be the situation posited -- not necessarily specifically mentioned by the plaintiffs, but referred to by defense -- which is: If there is a unique situation, such that a witness is going to be -- who is the best person to be testifying about a damage issue, and he or she is going to be

leaving the country, leaving the jurisdiction, leaving the company, and not available for deposition, or is ill, or they live in a foreign country, such that it would be extremely wasteful of resources to not have them also available for a damage piece, without it consuming the rule, which is there's going to be bifurcation in this case.

And I'm expecting, you know, the excellent counsel that's before the Court to work together, understanding what the Court's mindset is on this, to make it work. And if not, both the magistrate judge, Judge Spero, doing the settlement, or the soon-to-be-named magistrate judge for discovery could deal with it.

So it frequently happens, because I keep in very close contact with magistrate judges where my cases are referred out for discovery, almost when anything occurs in the case, we talk to each other. And if a Magistrate Judge comes to me and says, "You know, your order's being misused," or "It's really causing a huge burden," you know, I bring you all back, and we'd have a hearing on it, and we could discuss what needs to be done.

And I guess what I'm saying, largely to the plaintiffs, is: If you -- if you have a record -- and I expect you're going to do this in good faith -- that you're really being aggrieved by this prejudiced by my order down the road in terms of real -- you know, what actually goes on on the ground,

then bring it up before the magistrate judge. And if you can't get a resolution, come to this Court, and I could easily change my ruling, because things change in a litigation. And if it looks pretty clear that the case is going to be, you know, unduly, you know, lengthened because of the bifurcation, I generally don't do it, because I think it aids settlement, but I think in unique circumstances of this case, procedurally as well as substantively, at least from what I know at this point, I think it makes sense, because if I did the opposite, and I said, "No bifurcation," it's pretty hard to put that Humpty Dumpty back together again. It's easier to open it up and say, "Okay. You know, we've gone down the road this far. It hasn't worked. It's been abused," or whatever. And to do it the other way, that's what I'm going to do. That will be the order of the Court. The minutes will so reflect.

Did you want to say something, Counsel?

MR. SIMON: I had one clarification. We do have a conference call with Magistrate Judge Spero next week to talk about this very issue. We've asked for some of the information. They want to give us marketing material. Is it your order that if there's a dispute about that; that it would be Magistrate Judge Spero that decides that, for purposes of settlement or the discovery?

THE COURT: What I'm saying is -- it's a little bit of an odd situation, because obviously, if the defendants

agree, then it's not an issue. If they don't agree, I can't order a pig in a poke, as it were. I can't say, "Well, you know, they have to produce whomever Judge Spero indicates."

Now, I don't want to order -- I don't want to put Judge Spero in a situation where he's, in effect, a settlement judge and a discovery judge. That's very awkward.

So my suggestion would be that if there is that kind of dispute, you put it on the shelf and get the discovery magistrate to deal with it, with the notion of what I've said and what Judge Spero's said, which is: To the extent that this truly relates in aid of settlement, and not discovery in the classic sense to prepare for trial or summary judgment or whatever or claim construction, then that -- I would delegate to the discovery magistrate judge the authority to order the production of limited discovery on damages in aid of settlement.

Does that answer your question?

MR. SIMON: Yes, your Honor.

THE COURT: And it's going to require a coöperative relationship, but I don't -- unless the parties were to agree that Judge Spero would be the discovery judge as well, which you could do, and he agrees to that, then he'd be wearing all of the hats.

In other words, I'm not prohibiting that, but it's a right that the parties have to preclude a settlement judge from

getting into the substance, which he or she would have to do if they were getting into the discovery. All right?

Mr. Reines, do you have anything you want to say?

MR. REINES: Not on that topic.

THE COURT: Did you want to quit while you were ahead?

MR. REINES: Quit while I was ahead on that topic. Thank you, your Honor.

The second issue that we had with regards to discovery limits -- and this is on pages 9 and 10 of the case-management conference statement jointly submitted in the 1550 matter. And this was just to put some bounds, again, on -- I think your Honor wisely stated as a presumptive basis -- some presumptive bounds on discovery. We've worked together coöperatively, as I've said; but I think it's harmless to put these in place; and, in fact, helpful.

So we would ask for a request for a production of documents of 50. Request for admissions of 30. Interrogatories of 25. And then the depositions that we asked for, which is really 10. It's pretty close to default, but as the Court knows, I'm requesting production. There's normally no limit, and that sometimes can lead to excesses that should be discouraged.

THE COURT: What I'm going to do on that is delegate that to the discovery magistrate judge, because for me, it

would be really shooting in the dark. You're going to be able to educate that magistrate judge. I'm going to be educated sort of secondarily as the case goes forward. And that magistrate judge will determine.

Because to say, you know -- I mean, most of the -- of the patent cases that -- of which I've presided or I've heard about usually require more than the federal rule limits, just because they're so complicated; but this is essentially a one-patent case. So I can imagine a circumstance -- and I think it might -- and I would exhort the discovery magistrate judge to put in limits. Maybe it's, you know, numbers of hours of depositions. I've done that. Maybe it's a total number of document requests; but I think that magistrate judge would want to see a discovery plan, so they could -- you know, where the party wanting more than whatever the other party wants can say, "Wait a minute. If we did 50, we would be cutting out this whole other area."

So for me to do that -- I'm very strongly in favor -- I think any good lawyer can make their case and try their case with the limits imposed by the rules. And I generally like to stick with those, but if I'm going to be delegating the discovery out to a magistrate judge, which I do reluctantly, I'd rather have that judge make that decision. So I'm not going to make that decision. All right?

MR. REINES: Thank you, your Honor.

THE COURT: All right. So that will be -- that's all I have on that particular case; but go on, sir. Yes.

MR. SIMON: I'm sorry. We did have one question, your Honor.

Realignment of the parties. The schedule we've set up here really puts us, as the plaintiffs, in a normal patent-infringement case, we're the patent owner. And we contemplate an amendment of the pleadings. And I was just going to request if we could, at that point, we could file a complaint. Right now we're the defendant, and then we have a counterclaim, and then a third-party complaint.

THE COURT: That's because there were dec.-relief actions filed?

MR. SIMON: Yes, yes, yes.

THE COURT: What's your response to that, Mr. Reines?

The Court obviously has authority to do that.

MR. REINES: Yeah. Thank you, your Honor.

The way we got to where we got was: The original complaint in this case that set off these three litigations now, was a complaint only against Cisco's customers. And Cisco stepped up the plate and filed a declaratory-judgment action in this Court, which is the first filed action in this court. And it was deemed that that was the primary action; and the other action was transferred there.

That background is important, because I think there

is significance to the fact that Cisco filed this case.

Now, I'm not asking right now -- and I don't think it would be appropriate right now -- for the Court to put -- set in stone what the trial's going to look like in this matter.

I mean, we have two cases going this way and that way; two very different sets of products, or at least pretty different sets of products, in the abstract. And so I think it's very premature, if we can't set discovery limits now and we can't do some of these other things, to decide a structure at trial, which is really the only consequence of the realignment, I think.

THE COURT: Let me interrupt and say my typical practice in this situation -- because I have this come up all of the time. I had one. I have one before me that was so contentious -- the parties couldn't agree, even as we were getting more to the end of the case -- that I had to bring in a Special Master to help the parties to mediate the issue of who would be the plaintiff. Can you imagine that? But they were all willing to pay for it.

So I would -- we may get to this point even earlier than pretrial, but what I typically do -- what I typically see in the pretrial filings is briefing on the Court's exercise of its discretion with respect to realignment of the parties.

And typically it becomes an easier question, then, because we see how the discovery is drawn; how the claim

construction is going. And it becomes pretty manifest.

I have not had many problems. One case was an exception, but because there were many, many, many patents. And there was a real fight, a legitimate fight on who really was the plaintiff, and one lawyer said she had a constitutional right to be the plaintiff. I'm still looking for the amendment that contained -- maybe there's a patent constitution out there. Maybe.

To the extent you're requesting it now, I'm just going to deny it without prejudice. And you know, the minutes will reflect that the Court will deal with that issue at no later than the pretrial process. And if the parties believe that the processing of the case or the litigation of the case has seen an impasse because there's a dispute about who ought to be the plaintiff -- I can't imagine that happening -- then I will -- you can file an administrative motion or a notice motion, and I'll make the decision.

All right. Does that answer your question?

MR. SIMON: Thank you, your Honor.

MR. REINES: Thank you, your Honor.

THE COURT: All right. Very well. So now let's go to the next case. This should be easier.

So the schedule in that case is substantially similar to the schedule in the first case, if not identical. Am I correct in that?

MR. SIMON: Identical.

THE COURT: I'm going to adopt that as well, if it makes it easier. And the rulings I made in the first case will be the rulings in the second case.

And if there comes a time when the parties believe that something more formal, like consolidation or some other coördination -- more than coördination, but some further alignment of the cases, let the Court know, because I imagine the parties anticipate that the claim -- the same terms would be -- would be construed the same presumptive; at least initially. Ten terms in both cases. Is that correct, Mr. Reines?

MR. REINES: Your Honor, there may be one or two terms. We're not there yet; but one or two terms only relevant in one case versus the other; but I think that the presumptive limit of ten should apply to both cases collectively. So in other words, I think one claim-construction process, treated as though it's one case in terms of the numerical limits; but the only caveat that I'm making is it is conceivable that a construction of one term or another term might be applicable only to one case.

THE COURT: All right. Do you agree with that?

MR. SIMON: We agree, your Honor.

THE COURT: All right. And the good news is I think by the time we get around to claim construction -- to the

claim-construction process, we'll actually have technology in this court, which may or may not be infringing. Maybe we can have teleconferences as well, but I guess we have to do a certificate to make sure that we're not infringing on anybody's patent; but that will work out well. We'll do the claim construction, and we'll do the tutorial. And you all can coördinate.

And the way -- just so -- since I have you here now, I will tell you that the way I typically do the tutorials -- have the experts do it; make the presentation to the Court. And have video equipment to capture the tutorial, but it's not otherwise on the record. It's just so that the Court can review it at different stages of the case.

The presentations -- and to try to make them -- it's hard to say this in patent cases -- as informative as possible, and less, shall we say, "advocative." I'm not saying "persuasive"; but not advocative, because then it just gets into a fight. It's just like having a mini claim construction.

And I also don't mind in the claim-construction process having a contextual discussion about the allegedly infringing product, because the Federal Circuit has now finally told us, if not formally, informally, that we can find out about context, because I always ask the question, "Why do I care about this?" Why do I care if "as" means "and," or whatever construct's coming down the pike?

And I think I'm entitled to ask that, if I feel I need to construe additional terms on my own decision, which I have done. I will do it.

So is there anything else to cover in these two cases?

MR. SIMON: No, your Honor.

I would like to point out there's one of our orders which wouldn't be applicable to the second case. Because we are the plaintiff already in that case, there would be no need for realignment in that.

THE COURT: We're not there yet.

MR. SIMON: Right.

THE COURT: We'll have to figure out -- for example, one possibility is -- I don't even know if this is -- counsel know this better than the Court would know it; as to how we try this case if we do get -- how do we do summary judgment when there's presumptively one summary judgment per side; but there are two cases here?

How realistically -- that should be a license to argue the same issues, because there are two different cases.

If we get to trial, how do we try the case?

We'll deal with all of that during the -- during the pretrial process, which is quite substantial.

So that's all really I think we can deal with at this time. Is there anything further?

MR. REINES: No, your Honor.

MR. SIMON: Nothing from our side, your Honor.

THE COURT: I will expect to get you your stipulation or not or lack of stipulation or not stipulation, and we'll get a rolling meeting with a coördinating magistrate judge, so we can move this case along; but I really do appreciate counsel working together.

And I want to say one other thing, which is already implicit. The Court values having associates work on these cases. I don't mean working in the back and -- like a proverbial mushroom.

I'm talking about getting a chance to argue and, you know, do stuff: Depositions, and argument in court, and even having recent associates presenting on particular terms in a patent in the construction process. So I can't order it, but I can exhort you. Otherwise, there will be no next generation of associates. So, to the extent you can do that, more power to you.

All right? Thank you very much, counsel.

MR. MEHTA: Thank you, your Honor.

(At 2:11 p.m. the proceedings were adjourned)

CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 10-1325 JSW and C. 09-1550 JSW, *Teleconference Systems LLC v. Tandberg, Inc.*; and *Cisco Systems, Inc. v. Teleconference Systems, LLC, et al.*, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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/s/ Lydia Zinn, CSR 9223, RPR

Monday, October 4, 2010